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In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

PADUNGSRI PHINPATHYA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an alien's absence from the United States may be considered meaningfully interruptive of his "continuous physical presence" in this country, for the purpose of determining eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), if the hardships associated with the alien's deportation would be as severe if the absence had not occurred.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–13a) is reported at 673 F.2d 1013. The decision of the Board of Immigration Appeals (App. B, *infra*, 14a–21a) is not reported. The decision of the immigration judge (App. C, *infra*, 22a–31a) is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1981. A petition for rehearing was denied on April 5, 1982 (App. D, *infra*, 32a). Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1254(a)(1) provides:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

STATEMENT

Respondent is a native and citizen of Thailand who first entered the United States as a nonimmigrant student in October 1969. Respondent's husband, also a native and citizen of Thailand, entered this country in August 1968. Both respondent and her husband were

authorized to remain until July 25, 1971, but they remained beyond that date without securing the permission of the immigration authorities (App. A, *infra*, 1a).

In January 1977, the Immigration and Naturalization Service charged respondent and her husband with deportability under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as nonimmigrants who had remained in this country beyond the time authorized in their visas. At the deportation hearing, both respondent and her husband conceded deportability and applied for suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1) (App. A, *infra*, 2a). That section authorizes the Attorney General, in his discretion, to suspend deportation of a deportable alien. In order to be eligible for this discretionary relief, an alien must show that (1) he has been physically present in the United States for a continuous period of at least seven years immediately preceding the application for suspension of deportation; (2) he has been a person of good moral character during that seven-year period; and (3) deportation would result in extreme hardship to the alien or to his spouse, parent or child who is a United States citizen or lawful permanent resident.

The immigration judge granted suspension of deportation as to respondent's husband, but found respondent ineligible for suspension on the ground that she had failed to meet the seven year "continuous physical presence" requirement of the statute (App. C, *infra*, 22a–31a). The evidence before the immigration judge showed that respondent had been absent from this country for a period of approximately three months, from January 1974 to April 18, 1974, when she traveled with her two children to visit her mother in Thailand

(*id.* at 28a; R. 78).[1] About one month prior to her departure, respondent obtained a new Thai passport; however, respondent did not have a nonimmigrant visa allowing her to reenter this country when she departed for Thailand. Accordingly, after her arrival in Thailand, respondent went to the United States Consul and obtained a nonimmigrant visa as the wife of a foreign student in the United States. Although respondent was aware that her husband's student visa had expired more than two years earlier, in 1971, she failed to inform the consular officer of that fact (App. C, *infra*, 28a; R. 83–87).

On the basis of this evidence, the immigration judge concluded that respondent's absence from the United States was neither brief, innocent, nor casual (App. C, *infra*, 28a):

> The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thai[ ] passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and therefore not entitled to the nonimmigrant visa she received). * * *

Accordingly, the judge concluded that respondent's departure was meaningfully interruptive of her continuous physical presence in the United States and that she

[1] "R." refers to the certified administrative record.

was ineligible for suspension of deportation (*id.* at 28a–29a).[2]

The Board of Immigration Appeals affirmed the immigration judge's decision on the continuous physical presence issue (App. B, *infra*, 14a–21a).[3] The Board observed that when respondent traveled to Thailand in January 1974, "she had already remained beyond the time authorized * * * [and] was only able to obtain a visa to return by misrepresenting her status as the spouse of a student, knowing full-well that she had no right to claim that status" (*id.* at 17a). Because respondent's departure substantially increased the likelihood that her illegal status would be discovered and that she would either be excluded or deported once her true status was ascertained, the BIA concluded that respondent's departure was a significant interruption of her physical presence in the United States (*id.* at 17a–18a).

The court of appeals reversed (App. A, *infra*, 1a–13a). Relying on its decision in *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979), the court con-

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[2]The immigration judge rejected the contention of the INS that respondent was barred from establishing her good moral character on the ground that she had given false testimony for the purpose of obtaining a benefit under the Immigration and Nationality Act. See 8 U.S.C. 1101(f)(6) (App. C, *infra*, 26a–27a). In addition, the judge found that respondent's daughter, who is a United States citizen, would suffer extreme hardship if respondent and her husband were deported (*id.* at 24a–26a).

[3]The Board reversed the immigration judge's decision with regard to the good moral character issue, finding that respondent gave false testimony at her deportation hearing (App. B, *infra*, 18a–19a). The Board also reversed the immigration judge's conclusion that respondent's husband was eligible for suspension of deportation, ruling that he had failed to establish extreme hardship either to himself or to his epileptic daughter (*id.* at 19a–21a).

cluded that the Board of Immigration Appeals had applied an erroneous legal standard in reaching its determination that respondent failed to meet the "continuous physical presence" requirement of Section 244(a)(1) of the Act (App. A, *infra*, 8a).[4]

In *Kamheangpatiyooth*, the court reaffirmed its earlier ruling in *Wadman* v. *INS*, 329 F.2d 812 (9th Cir. 1964), that the principles established by this Court in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), to decide whether a departure by a lawful resident alien was "intended" within the meaning of 8 U.S.C. 1101(a)(13) "should also guide the determination * * * whether an intervening absence interrupts the continuity of physical presence for purposes of [8 U.S.C. 1254(a)(1)]." 597

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[4]The court of appeals also overturned the BIA's determinations that respondent was not of good moral character and that respondent's husband did not prove that extreme hardship would result from deportation. On the good moral character issue, the court held that respondent's false statement on her application for suspension of deportation did not constitute false "testimony" within the meaning of 8 U.S.C. 1101(f)(6) and 1254(a)(1) (App. A, *infra*, 9a–11a). On the extreme hardship issue, the court held that the BIA abused its discretion in failing explicitly to consider the adverse effects of "the mere removal, and uprooting of [respondent's] epileptic child" from the United States (*id.* at 4a–5a).

We believe that both of these rulings are incorrect. The court's discussion of extreme hardship, in particular, demonstrates the Ninth Circuit's continued inability or unwillingness to follow this Court's directive in *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981), that the Attorney General's "construction and application of [the extreme hardship] standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Id.* at 144. See, *e.g.*, *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981); *Perez* v. *INS*, 643 F.2d 640 (9th Cir. 1981). At some point it may become necessary to ask this Court to review the Ninth Circuit's routine practice, despite *Wang*, of substituting its judgment for that of the BIA in suspension of deportation cases.

F.2d at 1256. Although this Court in *Fleuti* had pointed to several factors, including the duration of the alien's absence, the purpose of the visit and whether travel documents were obtained, as being relevant in determining whether a departure was meaningfully interruptive of an alien's permanent residence (374 U.S. at 462), the court in *Kamheangpatiyooth* concluded that "these factors are only evidentiary on the issue under section 244(a)(1) of whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion." 597 F.2d at 1257 (footnote omitted). In the court of appeals' view *(ibid.)*:

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

In the instant case, the court of appeals held that the BIA erred in concluding that respondent's departure was meaningfully interruptive merely because she thereby increased the risk of deportation (App. A, *infra*, 7a–8a).[5] Instead, the court concluded that under the *Kamheangpatiyooth* test, a departure that increases an alien's risk of deportation cannot be meaningfully interruptive unless it also reduces the severity of the hardships that would result from deportation; moreover, according to the court, even if both factors are present, it does not necessarily follow that the

[5] In so holding, the court of appeals stated (App. A, *infra*, 1a–2a, 6a) that respondent's three month trip to Thailand in 1974 was for the purpose of visiting her sick mother. However, there is no evidence in the record of the administrative proceeding that respondent's mother was ill at the time of respondent's trip, much less that the illness occasioned respondent's visit to Thailand.

departure must be regarded as having meaningfully interrupted the alien's continuous physical presence in the United States (App. A, *infra*, 8a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question of immigration law concerning the proper standard for determining whether a deportable alien has satisfied one of the eligibility requirements for the exceptional remedy of suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1). The court below held that the seven year "continuous physical presence" requirement of Section 244(a)(1) is satisfied in the case of an alien whose illegal overstay in this country is interrupted by a three month trip abroad and who misrepresents her status in order to secure reentry into the United States. It is our submission that Congress could not conceivably have intended this result.

The court below achieved this result, moreover, by application of a test that finds no support in the language, structure or history of the Act, all of which suggest that Congress intended that the "continuous physical presence" requirement be given a narrow construction. Although the courts of appeals have recognized an exception to the "continuous physical presence" requirement in the case of an alien whose absence is not "meaningfully interruptive" of his physical presence in this country under the test established in *Rosenberg* v. *Fleuti*, *supra*, the decision below effectively erodes that test by concluding that a departure cannot be meaningfully interruptive if it does not reduce the hardships that would flow from the alien's deportation. No other court has construed the *Fleuti* test in this manner.

The court of appeals' decision will frustrate the government's efforts to deport aliens, such as respondent,

who have repeatedly flouted the Nation's immigration laws. Furthermore, because the decision below seriously undermines this Court's *Fleuti* test, the decision will have substantial repercussions beyond the suspension of deportation context. If a lengthy departure such as respondent's is not meaningfully interruptive of an alien's continuous physical presence for purposes of determining eligibility for suspension of deportation, then a similar departure presumably would not be regarded as a meaningful interruption of an alien's lawful residence for purposes of determining, under 8 U.S.C. 1101(a)(13), whether a lawful resident alien had attempted or made an "entry" that would subject him to exclusion or deportation under the immigration laws. We submit that review by this Court is warranted to correct the manifest error of the court of appeals.

1. The court of appeals in this case, relying on its earlier decision in *Kamheangpatiyooth* v. *INS*, *supra*, has concluded that an alien's absence from the United States during the seven year period immediately preceding his application for suspension of deportation cannot be regarded as breaking the continuity of the alien's physical presence in this country unless the hardships of deportation are made less severe as a result of the absence (App. A, *infra*, 8a). This construction of the statute unjustifiably commingles two separate statutory elements, "extreme hardship" and "continuous physical presence." Nothing in the language or history of the Act supports this strained interpretation. As Justice Clark remarked in his dissent in *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 463 (emphasis in original), "'statutory construction' means * * * that the Court can *construe* statutes but not that it can *construct* them. The latter function is reserved to the Congress * * *." It is apparent that the court of appeals failed to heed this admonition.

The decision below, like that in *Kamheangpatiyooth*, is based on the erroneous assumption that Congress intended Section 244(a)(1) "to be generously construed." 597 F.2d at 1256. Our reading of the language, structure and history of the statute points in precisely the opposite direction.

In Section 244(a)(1) Congress provided that an alien applying for the extraordinary relief of suspension of deportation must have been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application * * *." 8 U.S.C. 1254(a)(1). The language of the statute reflects a congressional intent that the "continuous physical presence" requirement be read narrowly. On its face, the statute "contains no exception to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation." *McColvin* v. *INS*, 648 F.2d 935, 937 (4th Cir. 1981). Moreover, in *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956), this Court rejected the suggestion that it should resolve all doubts in favor of the applicant in construing the suspension of deportation statute; instead, the Court stated, "we must adopt the plain meaning of a statute, however severe the consequences." More recently, in *INS* v. *Jong Ha Wang*, 450 U.S. 139, 145 (1981), this Court observed that a narrow interpretation of the term "extreme hardship" in Section 244(a)(1) "is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy."

In addition, comparison of Section 244(a)(1) with other contemporaneously enacted provisions of the Immigration and Nationality Act reinforces the view that Congress intended the "continuous physical presence" requirement in Section 244(a)(1) to be construed strictly. Thus, former Section 301(b) of the Act, 8 U.S.C. 1401(b), provided that certain individuals shall lose

their status as United States nationals and citizens unless they "come to the United States and [are] continuously physically present there for a period of not less than two years" between 14 and 28 years of age. Section 301(b) further provided that "[i]n the administration of this subsection absence from the United States of less than sixty days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence." The failure to include a similar provision in Section 244(a)(1) suggests that Congress meant the "continuous physical presence" requirement of that section to be given a narrow, if not a literal, interpretation.[6] See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

The legislative history of Section 244(a)(1) also reflects Congress' intention that the "continuous physical presence" requirement "be applied in a rigorous manner." *McColvin* v. *INS*, *supra*, 648 F.2d at 938. The predecessor to Section 244(a)(1) was enacted in 1948 and required only that an alien have "resided continuously in the United States for seven years or more" and show good moral character for the preceding five years. Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206. In its 1950 review of the Nation's immigration laws, the Senate Committee on the Judiciary noted that INS field officers had "criticized the administrative interpretation of the 7-year residence provision of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years." S. Rep. No.

[6] Similarly, Section 316 of the Act, 8 U.S.C. 1427, which establishes a five year continuous "residence" requirement for admission to citizenship as well as a separate requirement of "physical presence" totalling at least half of the period of residence, underscores the distinction in the Act between residence and physical presence.

1515, 81st Cong., 2d Sess. 602 (1950). Two years later, "in an attempt to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, 82d Cong., 2d Sess. 31 (1952)), Congress amended the suspension of deportation statute to require seven years' continuous *physical presence* in the United States.[7] It thus is apparent that Congress intended the "continuous physical presence" requirement to be strictly construed. The court of appeals' overly generous interpretation of the statute is directly contrary to this intent.

2. Until the Ninth Circuit's decision in 1964 in *Wadman* v. *INS*, *supra*, the lower courts and the Board of Immigration Appeals generally applied a strict, literal interpretation of the "continuous physical presence" language in Section 244(a)(1) and held ineligible for suspension of deportation any alien who was absent from the United States during the seven year period, without regard to the circumstances surrounding the absence. See, *e.g.*, *Arellano-Flores* v. *Hoy*, 262 F.2d 667, 668 (9th Cir. 1958); *United States ex rel. Bruno* v. *Sweet*, 133 F. Supp. 3, 6–7 (W.D. Mo. 1955), aff'd, 235 F.2d 801 (8th Cir. 1956); *Matter of Jacobson*, 10 I. & N. Dec. 782 (B.I.A. 1964); *Matter of Wong*, 10 I. & N. Dec. 513 (B.I.A. 1964). But see *McLeod* v. *Peterson*, 283 F.2d 180, 185–187 (3d Cir. 1960). In *Wadman*, however, the court held that the standards of *Rosenberg* v. *Fleuti*, *supra*, should be applied to determine whether an alien's trip outside the United States was a sufficiently significant event as to break the continuity of the alien's physical presence in the United States.

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[7] The 1952 Act also required an alien to show "exceptional and extremely unusual hardship" in order to qualify for suspension of deportation. 8 U.S.C. (1952 ed.) 1254(a)(1). Although this provision was subsequently amended to require that the alien show that deportation would result in "extreme hardship" (Act of Oct. 24, 1962, Pub. L. No. 87–885, Section 4, 76 Stat. 1248), the "continuous physical presence" requirement remained unchanged.

This Court in *Fleuti* had construed the term "intent" in the exception to the definition of "entry" in 8 U.S.C. 1101(a)(13) for unintended departures by lawful resident aliens "as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." 374 U.S. at 462. The Court refused to hold that a lawful resident alien like Fleuti is subject "to exclusion for a condition for which he could not have been deported had he remained in the country" merely because he "steps across a border and, in effect, steps right back * * *." *Id.* at 460. In light of Congress' unquestioned ameliorative intent in creating an exception to the strict "entry" doctrine, the Court concluded that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status * * *." *Id.* at 462. The Court noted that among the factors to be considered in determining whether a departure was "meaningfully interruptive" are the duration of the alien's absence, the purpose of the trip and whether the alien had to procure travel documents in order to make the trip.

The Ninth Circuit in *Wadman* concluded that "the term 'continuous' is no more subject to a hard and fast construction than is the term 'intended.' The question is whether the interruption, viewed in balance with its consequences, can be said to have been a significant one under the guides laid down in Fleuti." 329 F.2d at 816. Following the decision in *Wadman*, the courts of appeals and the BIA began to apply the *Fleuti* standards in determining whether an alien's trip abroad broke the continuity of his physical presence in the United States for purposes of Section 244(a)(1). See, *e.g.*, *Toon-Ming Wong* v. *INS*, 363 F.2d 234, 235–236 (9th Cir. 1966); *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758, 760–761 (9th Cir. 1972); *Heitland* v. *INS*, 551 F.2d 495, 500–504 (2d Cir.), cert. denied, 434 U.S. 819

(1977); *Mamanee* v. *INS*, 566 F.2d 1103, 1105 (9th Cir. 1977); *Matter of Wong*, 12 I. & N. Dec. 271 (B.I.A. 1967).

We are not at all certain that application of the *Fleuti* standards in the suspension of deportation context is consistent with Congress' intent that the "continuous physical presence" requirement in Section 244(a)(1) be construed strictly. See pages 10–12, *supra*. However, the decision below, which ignores the standards established in *Fleuti*, is in direct conflict with the decisions of the other courts of appeals that have applied the *Fleuti* standards in this context.

For example, in *Heitland* v. *INS*, *supra*, the Second Circuit relied on both *Fleuti* and *Wadman* in concluding that the aliens' six week trip abroad was meaningfully interruptive of their continuous physical presence in this country. The court noted that while the purpose of the trip, to visit Mr. Heitland's ailing sister, was consistent with the intent to return and resume residence in the United States, other relevant factors militated strongly against a finding that the aliens' presence was continuous. 551 F.2d at 501–502. First, unlike Fleuti and Wadman, "who were at all times lawful permanent resident aliens prior to their departure, the Heitlands, once they remained beyond the six-month period for which they were admitted to stay in the United States, were at all times present in this country in violation of its laws." *Id.* at 502. Because the Heitlands had "no right at all to reside in this country at the time of their departure for their native land," their situation was markedly different from that of Fleuti and Wadman, "who had the right to reside in the United States, [and] would not have been subject to deportation if they had simply remained within this country's borders." *Ibid.* Second, the court noted that before embarking on their trip the Heitlands had to obtain

passports and visas, thus evidencing "the deliberateness with which [the trip] was undertaken." *Ibid.* Finally, the court pointed out that "in using implicitly deceptive methods to secure re-entry in the United States, the Heitlands were engaged in a course of conduct directly contrary to a 'policy reflected in our immigration laws.' " *Id.* at 503, quoting *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462.

The circumstances of this case are remarkably similar to those in *Heitland*. Here, respondent traveled abroad for three months but intended at all times to return to the United States. On the other hand, as in *Heitland*, respondent was illegally in the United States when she departed and, accordingly, she had no reasonable basis to expect the government to permit her to remain in this country or readmit her upon her return. Respondent obtained a passport prior to her departure, an event that should have caused her "to consider more fully the implications involved in [her] leaving the country." *Rosenberg* v. *Fleuti*, *supra*, 374 U.S. at 462. Finally, as both the immigration judge (App. C, *infra*, 28a) and the Board of Immigration Appeals (App. B, *infra*, 17a–18a) found, respondent knowingly misrepresented her status in order to secure reentry into the United States. Hence, the Second Circuit's statement in *Heitland* is equally applicable to respondent:

> The implicitly fraudulent circumstances of [her] return, when considered with the admitted illegality of [her] presence in the United States before [her] departure and the substantial period of time for which [she] absented [herself], do not present a picture of the type of hardship or injustice which *Fleuti* or its progeny were intended to remedy. This was a substantial and deliberate interruption of an illegal presence in the United States, accomplished through consciously misleading conduct.

551 F.2d at 503–504. The court below, however, disregarded the standards established in *Fleuti* and concluded that the BIA erred in finding respondent's absence meaningfully interruptive because "the hardships [of deportation] would be as severe if the absence had not occurred" (App. A, *infra*, 8a). This conclusion cannot be reconciled with the Second Circuit's construction of Section 244(a)(1) in *Heitland*.

The decision below is also in conflict with the decision of the Fourth Circuit in *McColvin* v. *INS*, *supra*. In *McColvin*, the alien was found deportable for staying in this country beyond the time authorized and was granted the privilege of voluntary departure. The day after he departed the United States the alien reentered this country as a nonimmigrant visitor for business authorized to remain for a period not to exceed six months. In concluding that the alien's one-day absence was meaningfully interruptive, the court observed that "any roots that petitioner had established in the United States were put down with the knowledge that his stay in this country was temporary, and, therefore, any plans or expectations for the future that he might have developed could not have been legitimate ones." 648 F.2d at 939. In addition, the court noted that the alien left "with the knowledge that, if he did not depart voluntarily, he would be deported. If he left with the intention of returning, that intention was disingenuous." *Ibid.*

Under the court of appeals' decision in this case and *Kamheangpatiyooth*, however, factors such as those adverted to by the Fourth Circuit in *McColvin* are "'only evidentiary' as to whether an absence breaks the continuity of seven years presence" (App. A, *infra*, 6a, quoting *Kamheangpatiyooth* v. *INS*, *supra*, 597 F.2d at 1257). McColvin's one-day departure was brief and undoubtedly did not affect the hardships he could be expected to suffer if he were later deported. Although

McColvin may have increased the risk of deportation as a result of his absence, the court below has held that an absence cannot be considered meaningfully interruptive unless *both* factors—an increase in the risk of deportation *and* a reduction in the severity of hardship—are present (App. A, *infra*, 8a).

In short, by holding that respondent's lengthy trip abroad and illegal reentry into the United States have no legal effect on her eligibility for suspension of deportation, the court of appeals has essentially read the "continuous physical presence" requirement out of the Act.[8] This result conflicts with the decisions of the other courts of appeals that have considered the issue.

3. Finally, and perhaps most important, the decision below is inconsistent with this Court's decision in *Rosenberg* v. *Fleuti*, *supra*. Although *Fleuti* and this case involve different sections of the Immigration and Nationality Act, since *Wadman* the courts and the BIA have treated the two sections as analytically analogous. Under *Fleuti*, a lawful resident alien is regarded as having made an "entry" within the meaning of 8 U.S.C. 1101(a)(13) if his departure was meaningfully interruptive of his permanent residence in the United States. If a departure is meaningfully interruptive for purposes of invoking the entry doctrine, then it should also be meaningfully interruptive of an alien's "continuous

[8] The decision below does not represent an isolated instance in which the Ninth Circuit has effectively disregarded the "continuous physical presence" requirement. See *Chan* v. *INS*, 610 F.2d 651 (1979), opinion withdrawn and petition for rehearing dismissed for mootness, 649 F.2d 753 (1980) (neither three-month trip to Hong Kong nor two-month trip to Austria were meaningfully interruptive); *de Gallardo* v. *INS*, 624 F.2d 85 (1980) (three and one-half month pleasure trip did not interrupt period of continuous presence); *Sida* v. *INS*, 665 F.2d 851 (1981) (month-long visit to Thailand to get married did not interrupt continuity of physical presence).

physical presence" within the meaning of Section 244(a)(1).

Under the standard adopted by the court of appeals, however, it would be virtually impossible to conclude in any given case that an alien has made a meaningful departure. Thus, in the Ninth Circuit at least, few if any lawful resident aliens who leave the United States will be excludable at the border pursuant to 8 U.S.C. 1225, 1226, because they will not be regarded as making an "entry" on their return.[9] Accordingly, the decision below will seriously hamper the efforts of immigration authorities to keep inadmissible aliens out of this country.

As the Fourth Circuit pointed out in *McColvin* v. *INS*, *supra*, 648 F.2d at 938, "[t]he criteria laid down in *Kamheangpatiyooth* clearly gave rise to a broader interpretation of 'continuous' than the *Fleuti* Court gave to 'intended.' " This result is ironic because the statute at issue in *Fleuti* was designed "to ameliorate the severe effects of the strict 'entry' doctrine" (374 U.S. at 462) with respect to lawful resident aliens, whereas the "continuous physical presence" requirement in Section 244(a)(1) was meant "to discontinue lax practices and discourage abuses" (H.R. Rep. No. 1365, *supra*, at 31) with respect to deportable aliens. In this case, the court of appeals nevertheless has held that deportable aliens who have illegally overstayed their visas and have used deceptive means to gain reentry

[9] In *Plasencia* v. *Sureck*, 637 F.2d 1286 (9th Cir. 1980), cert. granted *sub nom. Landon* v. *Plasencia*, No. 81-129 (Jan. 11, 1982), the Ninth Circuit held that even when a returning lawful resident alien has attempted to smuggle illegal aliens into this country contrary to a policy reflected in our immigration laws, and thus should be regarded as making an "entry" under *Fleuti*, that alien may not be excluded at the border but must be admitted into the United States and proceeded against, if at all, in deportation proceedings. This case, like *Plasencia*, is inconsistent with this Court's decision in *Fleuti*.

following a substantial absence will be eligible for the "exceptional * * * remedy" (*INS* v. *Jong Ha Wang*, *supra*, 450 U.S. at 145) of suspension of deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
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JULY 1982

APPENDIX A

AMENDED OPINION

NIYOM PHINPATHYA AND PADUNGSRI PHINPATHYA,
PETITIONERS,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

No. 80–7454.

United States Court of Appeals
Ninth Circuit.
Argued and Submitted May 6, 1981.

Decided Oct. 1, 1981.

As Amended on Denial of Rehearing and Rehearing
En Banc April 5, 1982.

Before CANBY, REINHARDT, Circuit Judges, and PFAELZER*, District Judge.

REINHARDT, Circuit Judge.

Petitioners appeal the denials of their applications for suspension of deportation. We reverse.

Petitioners, husband and wife, are natives and citizens of Thailand who first entered the United States as nonimmigrant students. Mr. Phinpathya entered in August, 1968 and Mrs. Phinpathya in October, 1969. They were authorized to remain in the United States until July, 1971, but they remained beyond that date without permission. In 1974, Mrs. Phinpathya visited her sick

*Honorable Marianna Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

mother in Thailand for three months; she reentered the United States as the spouse of a nonimmigrant student.

Deportation proceedings commenced in January, 1977. Orders to Show Cause were issued charging petitioners with deportability under 8 U.S.C. § 1251(a)(2) as nonimmigrants who had remained beyond the time authorized. At the deportation hearing, petitioners admitted deportability and applied for suspension of deportation under 8 U.S.C. § 1254(a)(1). The immigration judge granted Mr. Phinpathya's application, but denied Mrs. Phinpathya's application. The immigration judge found Mrs. Phinpathya to be statutorily ineligible for suspension of deportation on the ground that she had not satisfied the seven years continuous physical presence requirement of section 1254(a)(1). Mrs. Phinpathya was given voluntary departure.

The immigration judge's rulings were appealed to the Board of Immigration Appeals (BIA). The BIA reversed as to Mr. Phinpathya on the ground that he failed to meet the extreme hardship requirement of section 1254(a)(1). The BIA affirmed as to Mrs. Phinpathya on the grounds that (1) she failed to meet the continuous physical presence requirement of section 1254(a)(1), and (2) she failed to meet the good moral character requirement of section 1254(a)(1).

Section 1254(a)(1) empowers the Attorney General, in his discretion, to suspend deportation.[1] To be eligible for this discretionary suspension of deportation, however, an alien must show: (1) continuous physical presence in the United States for the seven years immediately preceding his application for suspension of deportation, (2) good moral character for these seven years, and (3) extreme hardship to himself or to his

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[1] For the purpose of § 1254(a)(1), the Immigration and Naturalization Service acts as a delegate for the Attorney General.

spouse, parent or child who is an American citizen or a lawful permanent resident. 8 U.S.C. § 1254(a)(1). The issue in the case before us is whether the BIA erred in its determination that neither Mr. nor Mrs. Phinpathya was eligible for suspension of deportation.

A. Mr. Phinpathya

The BIA denied Mr. Phinpathya's application for suspension of deportation on the ground that he did not prove extreme hardship.[2] We must decide whether the BIA abused its discretion in its finding that Mr. Phinpathya would not suffer extreme hardship if deported. *See INS v. Wang*, 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981) (per curiam).

In *Wang*, the Supreme Court stated that the Immigration and Naturalization Act commits the determination of extreme hardship "in the first instance to the Attorney General and his delegates, and [that] construction and application of [the extreme hardship] standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." 101 S.Ct. at 1031. We proceed in our review of the decision of the BIA, therefore, mindful of the limited nature of our function.

This is not the usual case in which the parents of an American citizen child are to be deported. *Cf. Wang*, 101 S.Ct. at 1031. Here, the Phinpathyas have a young daughter, Nissa, who was born in the United States and is an American citizen. What distinguishes this case, however, is the fact that Nissa has epilepsy. She regularly suffers from convulsive attacks. Nissa's epilepsy, although controlled, requires constant medical attention. She has a personal physician whom she visits

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[2] The BIA held that Mr. Phinpathya satisfied the seven years continuous physical presence and the good moral character requirements of § 1254(a)(1).

weekly. She takes anti-convulsive medicine on a daily basis. Without constant medical attention and medication, Nissa's life would be endangered.

The BIA, in making its determination, considered both the hardship to Mr. Phinpathya and to Nissa.[3] It found no extreme hardship because there was insufficient evidence on the record that Nissa would receive inadequate medical care in Thailand. Following the mandate of the Supreme Court, we do not question this finding on the basis of our own view of what constitutes extreme hardship.

We do, however, question the finding relating to Nissa on a different ground. The BIA proceeded on the assumption that when evidence of a serious medical problem is presented, a finding of extreme hardship cannot be made unless there is a factual showing of inadequate medical care in the country to which the alien will be deported. It then based its hardship determination on the fact that there was no proof offered that medical care for epileptics was inadequate in Thailand.

While the absence of proof of inadequate medical care may in some cases be dispositive of extreme hardship claims based on medical problems, it is not the exclusive factor to be considered in all such cases. In this case, the BIA did not consider, for example, whether the mere removal, and uprooting of an epileptic child, wholly apart from the question of comparative medical care, constitutes extreme hardship. The effects on an epileptic child of a long trip and of being placed in a wholly different environment are factors that, at the

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[3] 8 U.S.C. § 1254(a)(1) requires that one eligible for suspension of deportation be "a person whose deportation would . . result in extreme hardship to . . . his . . . child, who is a citizen of the United States . . ." Thus, extreme hardship to Nissa is imputed, under this statutory provision, to Mr. Phinpathya. Mr. Phinpathya's extreme hardship, therefore, would be derivative.

least, bear on a hardship determination and should have been considered by the BIA. None of the reasons asserted by the BIA reflects consideration of those factors, although there is evidence in the record relating to them.

A failure to consider factors relevant to the determination of hardship is an abuse of discretion. *Santana-Figueroa v. INS*, 644 F.2d 1354, 1356 n.5 (9th Cir. 1981); *see Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9th Cir. 1980). Thus, the BIA's failure to consider the factors involved in uprooting an epileptic child from her community and moving her to Thailand constitutes an abuse of discretion. Accordingly, the order of the BIA as to Mr. Phinpathya is reversed and remanded for reconsideration of the question of extreme hardship.

B. *Mrs. Phinpathya*

The basic principles to be applied in determining whether an alien's departure is "meaningfully interruptive" of the seven years continuous presence requirement of section 1254(a)(1) were recently set forth by this court in *Kamheangpatiyooth v. INS*, 597 F.2d 1253 (9th Cir. 1979).[4] The court stated:

> To effectuate the purposes underlying the continuous period requirement, and to realize Congress's desire (identified in [*Rosenberg v.*] *Fleuti* [, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963)]) to avoid exposing aliens to unexpected risks and unintended consequences, the Board must determine whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion.

Id. at 1257. Thus, when deciding whether an absence is

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[4] These principles were reaffirmed in in [*sic*] *de Gallardo v. INS*, 624 F.2d 85, 86–87 (9th Cir. 1980).

"meaningfully interruptive" we must be mindful of what we identified in *Kamheangpatiyooth* as the Congressional purpose underlying the seven years continuous presence requirement:

> It was Congress's judgment that presence of that length was likely to give rise to a sufficient commitment to this society through establishment of roots and development of plans and expectations for the future to justify an examination by the Attorney General of the circumstances of the particular case to determine whether deportation would be unduly harsh . . . . Presence that is only intermittent suggests the alien has not become so attached to this country that the authorities should consider suspending normal operation of the immigration laws on his behalf.

Id. at 1256.

Three factors that are helpful in determining whether a departure is "meaningfully interruptive" are: (1) the length of the absence, (2) the reason for the absence, and (3) the necessity of travel documents. *de Gallardo v. INS*, 624 F.2d 85, 87 (9th Cir. 1980); *Kamheangpatiyooth*, 597 F.2d at 1257. These three factors, however, are "only evidentiary" as to whether an absence breaks the continuity of seven years presence. *Kamheangpatiyooth*, 597 F.2d at 1257. "To treat them as if they were in themselves the object of the inquiry may defeat the objectives of the statute." *Id.* at 1257–1258. Thus, the proper application of the *Kamheangpatiyooth* test is to view the circumstances in their totality, and analyze those circumstances in light of the Congressional purpose underlying the continuity requirement. *id.* at 1258; *see de Gallardo.*

With the exception of her three month trip to Thailand in 1974 to visit her sick mother, Mrs. Phinpathya was physically present in the United States for the eight years immediately preceding her application for

suspension of deportation. Although she travelled to Thailand with her two children, her husband remained in the United States during the absence, and she intended, at all times, to return to the United States.[5]

In concluding that Mrs. Phinpathya's trip to Thailand was "meaningfully interruptive," the BIA relied exclusively on its finding that "by her departure, she increased substantially the likelihood that her actual illegal status would be discovered" and that she thereby increased her risk of deportation. Although the BIA purported to apply the *Kamheangpatiyooth* test, it misinterpreted the basic thrust of that test and repeated the same error it had made in that case. In *Kamheangpatiyooth*, the immigration judge "fixed his attention directly on the duration of the absence, its purpose, and whether travel documents were obtained." 597 F.2d at 1257. This court reversed on the ground that it is error to treat isolated factors as determinative of the question of whether an absence is "meaningfully interruptive." By relying exclusively on the fact that Mrs. Phinpathya increased her risk of deportation by her absence, the BIA treated that factors as "the object of the inquiry," and failed to view the circumstances in their totality and in light of the underlying Congressional purpose.

Moreover, the BIA misread *Kamheangpatiyooth* in an even more elementary manner. In *Kamheangpatiyooth*, the court held that an absence cannot be

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[5]The facts here are similar in significant respects to those in *Kamheangpatiyooth* and *de Gallardo*. In those cases, this court reversed and remanded orders of the BIA, which held that the alien's departure was "meaningfully interruptive" of the seven year period. In *Kamheangpatiyooth*, the alien, a native and citizen of Thailand, left the United States for one month to visit his sick mother in Thailand; the alien intended, at all times, to return to the United States. In *de Gallardo*, the alien took a three and one-half month vacation in Mexico and Honduras.

"meaningfully interruptive" if two factors are present: (1) the hardships would be as severe if the absence had not occurred, and (2) there would not be an increase in the risk of deportation as a result of the absence. *Id.*[6] The court did not hold, however, as the BIA seems to believe, that an absence is, *ipso facto*, "meaningfully interruptive" if one, or even both, of those factors is not present, and it did not hold that an increase in the risk of deportation necessarily renders an absence "meaningfully interruptive." In relying exclusively on the increase in the risk of deportation as the basis for concluding that Mrs. Phinpathya's absence was "meaningfully interruptive," the BIA clearly misread the *Kamheangpatiyooth* discussion of that issue.

Accordingly, we hold that the BIA applied an erroneous legal standard in reaching its determination that Mrs. Phinpathya failed to meet the continuous presence requirement.

Our next inquiry is whether the BIA properly concluded that Mrs. Phinpathya was not of good moral character during the seven years preceding her application for suspension of deportation. 8 U.S.C. section 1101(f)(6) provides, *inter alia:*

> (f) For the purposes of this chapter—No person shall be regarded as, or found to be, a person of good moral character, who during the period for which good moral character is required to be established, is or was—

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[6] The court wrote:

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

Kamheangpatiyooth, 597 F.2d at 1257.

> (6) one who has given false testimony for the purpose of obtaining any benefits under this Chapter . . . ."

The Immigration and Naturalization Service contends that Mrs. Phinpathya gave "false testimony for the purpose of obtaining . . . benefits under this chapter," and thus was not of good moral character. We disagree.

Specifically, the Service points to three instances in which Mrs. Phinpathya gave "false testimony."[7] First, she stated on her application for suspension of deportation that she had made no departures from the United States since the time of her first entry. Although clearly false, the statement on her application did not constitute "testimony" within the meaning of sections 1101(f)(6) and 1254(a)(1). The term testimony does not encompass all statements, or even all statements made under oath. Testimony means a statement made by a witness under oath for the purpose of establishing proof of a fact to a court or tribunal. *People v. Gilbert*, 217 Cal.App.2d 662, 666, 31 Cal.Rptr. 920 (1963); *State v. Schifsky*, 243 Minn. 533, 69 N.W.2d 89, 93 (1955); Black's Law Dictionary 1324 (5th ed. 1979). It is distinguished from statements made under different circumstances, and from evidence derived from writings and

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[7] The Service also asserts that Mrs. Phinpathya "knowingly lied" to the American Consulate in Bangkok, in order to obtain a visa to return to the United States in 1974. Since the Service implicitly concedes that the statements made to the American Consulate in Bangkok were not "for the purpose of obtaining any benefit under this chapter," we do not consider whether she gave "false testimony" in that instance. Moreover, since the BIA did not rely on Mrs. Phinpathya's allegedly false statements on her visa application, we are unable to affirm the order of the BIA on that ground. *F.P.C. v. Texaco*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974); *Patel v. INS*, 638 F.2d 1199, 1201 (9th Cir. 1980).

other sources. *State v. Ricci*, 107 R.I. 582, 268 A.2d 692, 697 (1970).

Had Congress intended sections 1101(f)(6) and 1254(a)(1) to encompass all statements, or even all statements under oath, it would have so provided. When Congress intends that a statutory provision apply to all statements rather than just testimony, it has said so explicitly. For example, 18 U.S.C. § 1001 provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States . . . falsifies . . . or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document . . . shall be fined . . . or imprisoned . . . ." *See, also*, 18 U.S.C. §§ 1002–1027.[8] By limiting sections 1101(f)(6) and 1254(a)(1) to "false testimony," Congress deliberately provided that only a narrow class of statements and representations would constitute conclusive proof of lack of good moral character. The drastic consequences of the statute, which renders an alien who has given false testimony automatically ineligible for suspension of deportation, provides further support for a narrow interpretation of "false testimony."

Giving the term "false testimony" its ordinary meaning, as we do here, does not deprive the BIA of its discretion, or the opportunity to consider the significance of false statements. Under the statute, even if eligiblity is found to exist, the BIA must then decide, in its discretion, whether to grant the alien's request for suspension of deportation. In its determination of whether suspension of deportation is appropriate, the INS may weigh numerous factors, including false statements made by the alien. Thus, rejecting the harsh and

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[8] Even section 1001 is more limited than might appear from a literal reading of the provision. *See e.g., United States v. Bedore*, 455 F.2d 1109 (9th Cir. 1972).

sweeping interpretation of the term "false testimony" offered by the BIA creates no conflict with the Congressional purpose which underlies the statute.

Since Mrs. Phinpathya's written statement on her application for suspension of deportation is not a statement made by a witness under oath to establish proof of a fact to a court or tribunal, we hold that her statement is not "false testimony" within the meaning of the statute.

Second, at the deportation hearings, when Mr. and Mrs. Phinpathya were asked if it were true that they had not been out of the United States since their initial entries, the record shows the answer, "Yes, that's true." The answer is not followed on the record, however, by the parenthetical, "by both," as is every other answer to a question directed to both petitioners. The immigration judge noted that "it is possible that only one of the two respondents [petitioners herein] answered the question," and thus concluded that the record does not support a finding that Mrs. Phinpathya responded to the question. In so concluding, the immigration judge considered the testimony of the alternate trial attorney of the Service that Mrs. Phinpathya had indeed responded, but, apparently, gave it little weight. Although we are directly reviewing the order of the BIA, the determination made by the immigration judge deserves to be given much weight. *See Espinoza-Ojeda v. INS*, 419 F.2d 183 (9th Cir. 1969). The immigration judge was a witness to the specific event in question. Moreover, he was in the best position to evaluate the accuracy of the alternate trial attorney's recollection. After review of the record, we agree with the immigration judge's conclusion that the record does not support a finding that Mrs. Phinpathya gave "false testimony."

Third, the Service claims that Mrs. Phinpathya gave

"false testimony" when, at the deportation hearing, she testified that all statements on her application for suspension of deportation were true. The BIA, however, in concluding that Mrs. Phinpathya was not of good moral character, neither referred to, nor relied on, her testimony affirming the truth of her application. A decision rendered by an administrative agency "must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *F.P.C. v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141 (1974) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962)). This court has recognized the application of this principle in the context of immigration proceedings. *Patel v. INS*, 638 F.2d 1199, 1201 (9th Cir. 1980); *Castillo-Felix v. INS*, 601 F.2d 459, 462 n.6 (9th Cir. 1979). Since we are reviewing the order and decision of the BIA, we may not affirm on the basis of Mrs. Phinpathya's testimony as to the truth of the statements in her application, and it is thus unnecessary to consider whether that testimony was "false testimony" within the meaning of the statute. Under the circumstances of this case, remand for consideration of whether Mrs. Phinpathya's testimony regarding the truth of the statements in her application was "false testimony" is appropriate.

In summary, we hold that (1) the BIA applied an erroneous legal standard in its determination that Mrs. Phinpathya failed to satisfy the seven years physical presence requirement, and (2) the BIA erred in its determination that Mrs. Phinpathya failed to satisfy the good moral character requirement. Accordingly, we reverse the order of the BIA as to Mrs. Phinpathya and remand with instructions to reconsider the questions of seven years continuous presence and good moral character.

Disposition

The order of the BIA is reversed as to both petitioners and remanded for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530
JUN 6 1980

Files: A19 063 381
A21 272 984—Los Angeles

In re: NIYOM *PHINPATHYA*
PADUNGASRI *PHINPATHYA*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Michael D. Ullman, Esquire
Bert D. Greenberg, Inc.
8484 Wilshire Blvd., Suite 730
Beverly Hills, California 90211

CHARGE:

Order:
Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant student—remained longer than permitted (both respondents)

APPLICATION: Suspension of deportation

In a decision dated November 13, 1978, the immigration judge found the respondents deportable as charged. He also denied the female respondent's application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1), but granted the application of that of the male respondent. The respondents have appealed from these determinations and the Service has cross-appealed. The respondents' appeals will be dismissed and the Service's cross-appeal sustained.

The respondents are a husband and wife, and natives

and citizens of Thailand. The husband entered the United States in August 1968, as a nonimmigrant student, and the wife entered in October 1969, also as a nonimmigrant student. In 1974, she left the United States and upon her return was admitted as the spouse of a nonimmigrant student. In January 1977, Orders to Show Cause were issued, charging the respondents with deportability under section 241(a)(2) of the Act, as nonimmigrants who had remained beyond the time authorized. At the deportation hearing, with benefit of counsel, the respondents admitted all of the allegations of the Order to Show Cause and conceded their deportability on the charge. They also applied for suspension of deportation under section 244(a)(1) of the Act. The immigration judge found that Mr. Phinpathya met the physical presence and good moral requirements, and that he would suffer extreme hardship through his daughter if he was deported. He also found that Mrs. Phinpathya was not statutorily eligible for suspension of deportation on the ground that she had not satisfied the statutory requirement of seven years continuous physical presence immediately prior to her application for suspension of deportation. He granted her voluntary departure.

On appeal, the respondents contend that Mrs. Phinpathya has met the physical presence requirements for suspension of deportation, and that deportation would also cause her extreme hardship. The Service in its cross-appeal contends that Mrs. Phinpathya does not have the necessary physical presence, and that she does not have good moral character, because she gave false testimony at the deportation hearing. In the case of the Mr. Phinpathya, the Service contends that the finding of extreme hardship was incorrect because his daughter would not suffer extreme hardship if he was deported.

We will deal with the case of Mrs. Phinpathya first. We agree with both the Service and the immigration

judge that she has not met the physical presence requirements of section 244(a)(1) of the Act. In January 1974, approximately four years after her initial entry into the United States, she returned to Thailand with her two children. She remained there until April 1974. Before her departure, she renewed her passport at the Thai Consulate in Los Angeles and also apparently obtained U.S. passports for her children. She has stated that she wished to visit her mother in Thailand. Shortly before her visit expired, she went to the American Consulate in Bangkok, Thailand and obtained a nonimmigrant visa as the wife of a student. She was aware at the time she applied for the visa that her husband had not been in student status since 1971. She did not inform the consul of this fact. Upon her return to the United States, she was admitted as the nonimmigrant spouse of a student. Her Application for Suspension of Deportation (Form I-256A) indicates that her initial authorization to remain as a student in her own right expired in July 1971. From that point on, she was in the United States illegally.

The respondents claim that these factors did not add up to a significant interruption in her physical presence, because she did not intend by her departure in 1974 to give up her residence in the United States. They cite *Wadman* v. *Immigration and Naturalization Service*, 329 F.2d 812 (9 Cir. 1964) for the proposition that the interruption can only be termed significant if viewed in balance with its consequences. The respondents assert that the departure was not significant because Mrs. Phinpathya did not intend to give up her residence and did intend to return with her children after a brief visit abroad and rejoin her husband at their home in the United States. Although *Wadman*, id., is clearly applicable to the present case, the Ninth Circuit has since that decision decided another case setting forth its view on the holding of *Wadman*, id.

In *Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9 Cir. 1979), the court held that the issue in these cases is "whether an absence reduced the significance of the whole seven-year period as reflective of the hardship and unexpectedness of exposure to expulsion". id., at 1257.

In that case, a citizen of Thailand had been in the United States for somewhat over 12 years, but had, about seven years after his initial entry, left the United States for Thailand. His trip to Thailand lasted for one month, and was occasioned by the illness of his mother. Up until the time he left, he had been a nonimmigrant student in lawful status, and prior to his return to the United States, he had renewed his nonimmigrant student visa, having the bona fide intention of continuing his studies. His departure occurred between the fall and spring semesters, and he did in fact continue his studies after his return. It is clear from these facts, therefore, that the student had a reasonable expectation that his departure would not place him in a position jeopardizing his ability to return to the United States. He had been in lawful status before he left and returned with a proper claim to admission as a nonimmigrant student.

That is not the case with the present respondent. When she left in 1974, she had already remained beyond the time authorized. She was not a student. She was only able to obtain a visa to return by misrepresenting her status as the spouse of a student, knowing full-well that she had no right to claim that status. By her departure, she increased substantially the likelihood that her actual illegal status would be discovered, and ran the significant risk of not being able to return to the United States, regardless of her intention to rejoin her husband in the United States. Under the holding of *Wadman*, supra, this departure could not be

characterized as casual and innocent, involving deception to the degree that it did. It was consequently a significant interruption of her physical presence under this standard.

The same result holds true under the formulation of *Kamheangpatiyooth*, supra, for essentially the same reasons. Mrs. Phinpathya knew that she had no lawful status in the United States before she left. She also knew that she had no rightful claim to nonimmigrant status when she applied for a new visa. There was clearly a "reasonable basis for anticipating that the planned absence might imperil [her] status." *Kamheangpatiyooth, supra*, at 1259. She could not have reasonably expected to remain in the United States before her trip, as she was in an illegal status, and could not reasonably have expected to receive a nonimmigrant visa based on the false representation that her husband was a student, when she knew he was not. In fact, she had increased the prima facie likelihood that she would either be excluded or deported once her true status was discovered and her misrepresentation was known, because at that point, not only would she have been excludable under section 212(a)(20) of the Act, as one who had entered without a valid visa, but also under section 212(a)(19) as one who had secured a visa by fraud or willful misrepresentation of a material fact. Consequently, as she had made a significant departure and had interrupted her physical presence, she was statutorily ineligible for suspension of deportation.

To qualify for suspension of deportation, it was also necessary for her to show that she was a person of good moral character. The immigration judge found that she had not given false testimony to obtain a benefit under the immigration laws, and that even if she had, she had recanted the testimony in a timely manner. As the immigration judge noted in his decision, the transcript

does not indicate that Mrs. Phinpathya responded to the question asked by the immigration judge regarding departures from the United States subsequent to 1969. (Tr. p. 9). The record in addition shows that she had not listed the 1974 departure on her application for suspension. There is also the fact that an alternate Service trial attorney present at the hearing testified that Mrs. Phinpathya did state that she had not left in response to the question, although the interpreter did not translate the response to the question as coming from both respondents. (Tr. p. 82). It would therefore appear to us that Mrs. Phinpathya did give false testimony. Her justification for the false answer is not credible given the different opportunities she had to provide the correct information.

We also find that the false testimony was not recanted in a timely manner. For a recantation to be effective, it must be voluntary, timely and made before disclosure of the falsity becomes imminent. *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973). Mrs. Phinpathya's admission that she had left occurred after she had been confronted with the truth. At that point it came too late. She cannot be considered a person of good moral character because she gave false testimony under the provisions of section 101(f)(6) of the Act in order to obtain a benefit, suspension of deportation. This is a second basis for statutory ineligibility under section 244(a)(1) of the Act. We see no reason therefore to address ourselves to the question of extreme hardship, as such a finding, if possible, would not change the outcome of her application for suspension.

As for Mr. Phinpathya, we agree that he has shown both the requisite physical presence and good moral character. We do not agree that he has established extreme hardship. As he is a young, well educated man in good health, with substantial assets, he himself would not appear likely to suffer extreme hardship to such a

degree that he would be set apart from other aliens forced to leave the United States. Although he has been in the United States for 12 years, he still has family ties in Thailand and with his education and financial resources should be able to reestablish himself in Thailand.

The question of hardship through his daughter is a more difficult problem to resolve. The immigration judge's decision in finding that the daughter would suffer extreme hardship emphasizes the idea that she is "old enough to be aware of her roots in the community, at school, and her neighborhood". He also referred to the deportation of her parents either causing a break-up of the family, or forcing her to move to a country about which she knows very little. Although he noted that she suffers from an epileptic condition, he did not find that she would suffer harm because she could not receive adequate treatment for that condition in Thailand. There is a letter in the record from a doctor who has treated the daughter, in which it is stated that she would receive "definitely inferior" treatment in Thailand, when judged against American medical standards. The immigration judge found that this information was not supplied by an expert on medical treatment for epilepsy in Thailand, and he apparently discounted the letter for this reason.

Although we do not agree with the immigration judge that the doctor must be an expert on Thai medical standards, it was necessary for the respondent to establish that the doctor's assertion had a substantial basis, and was not simply personal conjecture. Without substantiation, his opinion does not provide persuasive proof that the daughter's return to Thailand would subject her to extreme medical hardship.

Without a medical basis to establish extreme hardship, it must be shown that the daughter would suffer

extreme hardship for some other reason. Since she is young, and would be going to Thailand with her immediate family, there appears to be no ground on which to find personal hardship. While she may have difficulties in adjusting to life in Thailand, there has been no showing that emotional, educational or other hardship would be of such a degree as to set her apart from other children taken to live in a foreign culture. *See, Banks* v. *INS*, 594 F.2d 760 (9 Cir. 1979). The respondents' appeals will accordingly be dismissed, and the Service's cross-appeal sustained.

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: The Service's cross-appeal is sustained.

FURTHER ORDER: The respondents are permitted to depart from the United States voluntarily within 30 days from the date of his order and under such conditions as the District Director deems appropriate; and in the event of failure to so depart, the respondents shall be deported as provided in the immigration judge's order.

/s/ _____
DAVID L. MILHOLLAN
Chairman

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES IMMIGRATION COURT
Los Angeles, California

File: A19 063 381
A21 272 984

November 13, 1978

In the Matter of

NIYOM PHINPATHYA
PADUNGASRI PHINPATHYA

Respondents

IN DEPORTATION PROCEEDINGS

CHARGE:

241(a)(2) of the Act, nonimmigrant remained longer

APPLICATION:

Suspension of deportation under Section 244(a)(1) of the Act and, in the alternative, voluntary departure

IN BEHALF OF RESPONDENTS:

Michael D. Ullman, Esq.
8484 Wilshire Blvd. Ste. 730
Beverly Hills, Calif 90211

IN BEHALF OF SERVICE:

William Odencrantz, Esq.
Trial Attorney
Los Angeles, Calif 90012

WRITTEN DECISION OF THE IMMIGRATION JUDGE

DISCUSSION AS TO DEPORTABILITY: Respondents are husband and wife, ages 39 and 30, who are both natives and citizens of Thailand. The husband en-

tered the United States in Honolulu, Hawaii on August 3, 1968 and at that time he was inspected and admitted as a nonimmigrant student for a temporary period and authorized to remain in the United States until July 25, 1971. He has never departed from the United States. The husband admits all five allegations and the charge contained in his Order to Show Cause and I find that he is deportable by evidence which is clear, convincing and unequivocal. I adopt the five allegations as my findings of fact and the charge as my conclusion of law.

Regarding the wife, she first entered the United States at Honolulu, Hawaii on October 11, 1969 at which time she was inspected and admitted as a nonimmigrant student for a temporary period and authorized to remain in the United States until July 25, 1971. However in January 1974 she returned to Thailand with her two United States citizen children and, as shown in lodged allegations 3 and 4 (Exhibit No. 13), she last entered the United States at Honolulu, Hawaii on or about April 18, 1974 at which time she was inspected and admitted as nonimmigrant spouse of a student for a temporary period and authorized to remain in the United States until January 30, 1975. She has not departed from the United States since that time. The wife admits all five allegations contained in her Order to Show Cause as well as the two lodged allegations regarding her last entry into the United States, and she admits the charge contained in her Order to Show Cause. I find that she is deportable by evidence which is clear, convincing and unequivocal. I adopt allegations 1 and 2 contained in her Order to Show Cause, allegations 3 and 4 in her lodged charge form and allegation 5 in the Order to Show Cause as my findings of fact, and I adopt the charge as my conclusion of law. Deportability is not in issue in either the husband or the wife's case.

DISCUSSION AS TO ELIGIBILITY FOR SUSPENSION OF DEPORTATION:

Both respondents have applied for the relief of suspension of deportation under Section 244(a)(1) of the Act. This section requires that the respondents shall have been physically present in the United States for a continuous period of at least seven years immediately preceding the date of their application and that they prove that, during all such period, they were and are persons of good moral character. In addition each respondent has a burden of showing that his deportation would result in extreme hardship to himself or to a spouse, parent or a child who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Considering extreme hardship first, the issue is whether the respondents have established that it would be an extreme hardship to themselves personally or to their two United States citizen children if they were deported to Thailand. Exhibit No. 8 is the California birth certificate of respondents' daughter, Nissa, born September 11, 1970, at Los Angeles, California. Nissa is now 8 years old. Exhibit No. 9 is the California birth certificate of respondents' son, Nelson, born February 19, 1972, at Los Angeles, California. Nelson is now 6 ½ years old. Respondents testified that for the last ten years the husband has been working as a produce clerk for the Ralph's Grocery Company. Three years ago they bought a coffee shop, which gives the husband two separate jobs, and the wife herself works full time in the coffee shop. Two years ago they bought their own home. Last year the husband was awarded a Masters Degree in Business Logistics (Exhibit No. 21). They testified that their family is now used to the American way of life and that it would be difficult for the husband to get a good job in Thailand. The children have just en-

tered the third grade and the first grade in elementary school. They speak very little of the Thai language. While the parents are attempting to teach the two children the Thai language, the children are always speaking English at home. Exhibits No. 17 and 18 are doctors letters concerning the older child's epilepsy; however, these letters are only received in evidence to show the oldest child's medical condition at this time. The doctor who wrote the letters is not an expert on medical treatment for epileptics in Thailand. Both parents and the youngest child are in good health.

Based on the testimony and evidence presented, I find that the respondents have failed to establish that it would be an extreme hardship to either of them personally or to their 6 ½ years old United States citizen son, Nelson, if the respondents were deported in Thailand. The mere fact that an alien's economic opportunities in a foreign country may be somewhat less than they are in the United States is not by itself sufficient to establish the extreme hardship required for suspension of deportation under Section 244(a)(1) of the Act, *Matter of Kim*, Interim Decision 2318 (BIA 1974).

However, based on all the evidence, I find that it would be an extreme hardship to the United States citizen daughter, Nissa, now age 8, if respondents were deported. She is now attending the third grade in elementary school. She is old enough to be aware that her roots in the community, at school, and her neighborhood, are in jeopardy in being severed. Such uprooting would not be an extreme hardship if the change were for the benefit of this child's family unit, such as her father being required to move to retain his employment; however, here the deportation of the parents would either break up the family unit or result in Nissa moving to a country she knows little about. Since the respondents have established that it would be an extreme hardship to their United States daughter, Nissa, if they

were deported to Thailand, we shall move on to other issues in this case.

Regarding the husband's moral character, he testified that he has never been arrested by the police or convicted of any crime in any country in the world. Exhibit No. 12 is a favorable Report of Investigation and no derogatory information concerning his moral character has been submitted. I find that the husband has been a person of good moral character for at least the last seven years.

Regarding the wife's moral character, there is an issue whether or not she is statutorily barred from establishing good moral character under Section 101(f)(6) of the Act as one who has given false testimony for the purpose of obtaining any benefit under the Act. Before seeing the Report of Investigation and the lodged allegations (which show that the wife made an exit and reentry into the United States in 1974), the respondents were asked the following question on the record during one of the earlier sessions of the hearing; "Neither one of you have been out of the United States at any time since you arrived here in 1968. Is that true?" The answer to the question came through the Thai interpreter and the answer was as follows. "That's true your Honor." The interpreter did not add "by both." It is possible that only one of the two respondents actually answered the question. The alternate trial attorney who was appearing on behalf of the Government at that time was later called as a witness by the regular trial attorney assigned to this case. The alternate trial attorney testified that when the Immigration Judge was going over the suspension of deportation applications (Exhibit No. 2 and (2)(a)) with the respondents informally off the record before asking the same questions again later on the record, that the wife was quiet when she was asked about any absences from the United States since 1969, and that she then stepped outside the court-

room with her husband and their then alternative attorney (the regular attorneys on both sides were not present at that time). The alternate trial attorney testified that upon their return to the court room both were asked about absences from the United States on the record and the wife answered the question as well as the husband even though the interpreter failed to add "by both." After the applications were signed and sworn to and placed in evidence along with the accompanying documents, the then trial attorney offered in evidence the Report of Investigation (Exhibit No. 12) which reflects that the wife had in fact departed and reentered the United States in 1974. There was another conference with the alternate attorney for the respondents and the respondents, resulting in the respondents' alternate attorney stating for the record that the wife was wrong about her last entry being in 1969 and that the last entry was in fact in 1974 as related in the Report of Investigation. This resulted in lodged allegations (Exhibit No. 13) which the wife admitted. Considering all the testimony and evidence concerning the issue of possible false testimony I find that the wife did not give false testimony for the purpose of obtaining and [*sic*] benefit under this Act. Even if I had found that there had been false testimony, I would find that there had been a timely recantation a few minutes after it had occurred. No other derogatory information was submitted concerning the wife's moral character and I find that she has been a person of good moral character for at least the last seven years.

The husband testified that he has not been out of the United States since his arrival on August 3, 1968. No evidence has been submitted to show any absence and I find that the husband has been physically present in the United States for a continuous period of at least the last seven years. Therefore, he is statutorily eligible for the relief of suspension of deportation.

Regarding the wife's continuous physical presence, she was absent from the United States from January 1974 to April 18, 1974. The wife testified that she left the United States in January 1974 intending to visit her mother in Thailand. She took her two United States citizen children with her while her husband remained in the United States. She testified that she did not intend to abandon her United States residence but rather intended to return at some future date. About a month before she left the United States she obtained a new Thailand passport from the Thai Consul here in Los Angeles. She planned to use the new passport to return to the United States, however she did not have a nonimmigrant visa allowing her to return to the United States when she left for Thailand. Therefore, after arrival in Thailand she went to the American Consul there and obtained a nonimmigrant visa as the wife of a foreign student in the United States. She neglected to inform the American Consul that her husband's student visa has expired three years earlier, in 1971. So the wife reentered the United States with her United States children on April 18, 1974 by using the recently obtained Thailand passport which contained the even newer nonimmigrant visa as the spouse of a student (who in fact had been out of status for three years).

The wife's three months absence was not brief, innocent, or casual. The absence would have been longer than three months if she had not obtained the spouse of a student visa as fast as she did obtain it. It was not casual because she had to obtain a new Thailand passport, as well as a nonimmigrant visa from the American Consul, to return to the United States. It was not innocent because she failed to inform the American Consul that she was the wife of a student who had been out of status for three years (and therefore not entitled to the nonimmigrant visa she received). Based on the testimony and evidence presented, I find that the wife has not

been physically present in the United States for a continuous period of at least seven years immediately preceding the date of her application for suspension of deportation. Therefore, the wife is statutorily ineligible for suspension of deportation and her application will be denied.

The remaining issue is whether or not the husband's application for suspension of deportation should be granted as a matter of administrative discretion. Since the wife's application will be denied, should the husband's application be denied for that reason only? Counsel on both sides state that they have found no case to cite as to what should be done when one spouse is statutorily eligible for suspension of deportation, and the other spouse is not. If the husband was the one who had the break in physical presence I would deny the wife's application because the husband is the main breadwinner for the family. When the respondents were asked what will happen if the husband's application were granted and the wife's application were denied, they indicated that they don't believe that could happen because the husband does not make enough money to support his wife in Thailand with or without the children.

An Immigration Judge has no authority to allow a wife to remain in the United States if her application for suspension of deportation is denied while her husband's application is granted. Stays of deportation for humanitarian reasons are solely within the jurisdiction of the District Director. Since the wife's application for suspension of deportation will be denied, the only relief available to her is voluntary departure and she may soon be required to depart the United States. I am going to give the husband the opportunity to make up his own mind as to what he should do at that time. The husband may elect to return to Thailand with his wife.

It is not essential that I make that decision for him. I am going to grant his application for suspension of deportation as a matter of administrative discretion. Unless Congress disapproves, or I am overruled on an appeal, eventually the husband will become a lawful permanent resident if he remains in the United States. At that time he will be able to petition for his wife as a second preference immigrant. Between now and then he will have many decisions to make regarding himself, his wife, and his two United States citizen children.

The wife has applied for the privilege of voluntary departure, and I will grant it to her as a matter of administrative discretion.

The wife has designated Thailand as the country of deportation.

ORDER: IT IS ORDERED that the female respondent's application for suspension of deportation under Section 244(a)(1) of the Act be, and hereby is, denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation the female respondent be granted voluntary departure without expense to the Government on or before sixty days from the date of service of this decision or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the female respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the female respondent shall be deported from the United States to Thailand on the charge contained in her Order to Show Cause.

ORDER: IT IS ORDERED that the deportation of the male respondent be suspended under the provisions

of Section 244(a)(1) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED that if Congress takes no action adverse to the granting suspension of deporation, that proceedings shall be canceled and appropriate action be taken pursuant to Section 244(d) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED that in the event Congress takes action adverse to the order granting suspension of deportation, the male respondent's proceedings shall be reopened upon notice to the male respondent.

/s/ _____
ROBERT T. GRIFFIN
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NIYOM PHINPATHYA AND
PADUNGSRI PHINPATHYA, PETITIONERS,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

NO. 80-7454
I&NS NOS.
A21-272-984
A19-063-381
FILED: APR 5 1982
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

ORDER

Before: CANBY and REINHARDT, Circuit Judges, and PFAELZER,* District Judge

The panel as constituted above has voted to deny the petition for rehearing. Judges Canby and Reinhardt voted to reject the suggestion for rehearing en banc and Judge Pfaelzer made no recommendation as to the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. F. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The panel has voted to file the attached Amended Opinion amending the Opinion as decided October 1, 1981.

*Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.